A

Gigatech Engineering Sdn Bhd v EnGreen Sdn Bhd (formerly known as 'EG Chemicals & Engineering Sdn Bhd')

B

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-28JM-2–06 OF 2022
AZMI ARIFFIN J
21 OCTOBER 2022

C

Companies and Corporations — Judicial management ('JM') — Application by creditors to strike out JM application — Creditors opposed company's JM application on ground no concrete plan was put forth to show how company could be turned around to continue as a going concern — Whether JM application
D *appeared to be tactical manoeuvre to stall hearing of winding up petition against company and to delay suits by other creditors — Whether public interest did not require JM order to be made per s 405(5)(a) of Companies Act 2016 — Whether case was plain and obvious one for JM application to be struck out*

E

There were three applications for hearing before the court — encls 6, 9 and 11. All of them sought to strike out an ex parte application by Gigatech Engineering Sdn Bhd ('Gigatech') to be placed under judicial management ('JM') and for a judicial manager to be appointed pursuant to s 405 of the Companies Act 2016 ('the CA') on the ground that rather winding up the
F company for being unable to pay its debts, Gigatech should be allowed, under JM, to be rehabilitated with the prospect of it continuing to be a going concern for the benefit of its creditors. Enclosure 6 was filed by Engreen Sdn Bhd ('Engreen') which had filed a winding up petition against Gigatech for failing to settle a RM126,942.86 judgment debt that Engreen had obtained against it.
G Gigatech had filed the JM application six days before the petition was due to be heard and if the court had granted the JM order, all proceedings against Gigatech would have been frozen unless permitted by the judicial manager or the court. Enclosure 11, meanwhile, was filed by another company which had a pending suit in the High Court against Gigatech for non-payment of a sum
H of RM1,805,568.47 for work done. The third application, encl 9, was filed by Malayan Banking Bhd to whom Gigatech owed about RM1.3m (as at the date of the filing of the JM application) for failing to make due payments under a security. In essence, all three enclosures, 6, 9 and 11, contended that there was no merit in Gigatech's JM application as no concrete proposals had been put
I forth to show how the financially ailing company could be turned around and continued as a going concern. It was contended that the JM application was a tactical move to stall Engreen's winding up petition and prevent other creditors from filing suits against Gigatech. On the other hand, Gigatech, referred to many projects in the offing that promised to earn it substantial profits. The

company also said that many hospitals were among its customers and that if it was allowed to continue to survive, the company could install in hospitals a new air-conditioning system ('the ICON system') that it had devised which could reduce the incidence of hospital-acquired infections, eliminate fungus, reduce damage to hospital equipment and reduce energy consumption. On those grounds, Gigatech relied upon s 405(5)(a) of the CA to contend that it was in the public interest to allow the company to be placed under judicial management.

Held, allowing encls 6, 9 and 11:

(1) Based on the facts and circumstances of the case, this was a plain and obvious case for striking out Gigatech's judicial management application (see para 65).

(2) The opinion given by the proposed judicial manager did not carry much weight for the court to give it consideration. He failed to give any concrete plans on how any of the purposes set out in s 405(1)(b) of the Companies Act 2016 could be achieved. He made a general projection statement that JM was the best option for Gigatech without giving reasons for that conclusion. The preliminary JM proposal report was full of uncertainties and did not put forward any suggestion as to how Gigatech might be rehabilitated or how its assets might be realised in order to pay off its creditors. There was no evidence to suggest that Gigatech could continue as a going concern. The proposed judicial manager's proposal did not show how Gigatech would be able to survive or secure better returns for the creditors if it was not wound up (see paras 43, 47 & 49).

(3) Gigatech did not come up with a concrete viable scheme on how to improve its cash-flow without new capital injection ('White Knight injection') because all new businesses were still at the quotation stage. There was nothing concrete to show that the company would be able to pay off its creditors and no certainty that Gigatech would be able to get back on its feet and regularise its financial position. The creditors opposed any restructuring plan. Without their support, even if a judicial manager was appointed, no restructuring plan could succeed (see paras 44–45 & 51).

(4) Given that the JM application was filed just six days before Engreen's winding up petition was due to be heard, the court was of the considered opinion that the filing of the JM application was just a tactical manoeuvre and for the collateral purpose of stalling the hearing of the petition and also to delay the progress of Suit 112 (see para 55).

(5) Public interest did not require Gigatech to be placed under JM. The ICON system it aimed to install in hospitals was a private project which

did not receive any financial assistance from the Government. Gigatech could not claim to be the representative and bastion of the public interest. Even if Gigatech was liquidated, there were other private companies which could step in and implement the ICON system. There was no need for the ICON system to be abandoned just because Gigatech went under liquidation. The consequences of not making a JM order would not cause any economic and social impact to the public (see paras 60–63).

[Bahasa Malaysia summary

Terdapat tiga permohonan untuk perbicaraan di hadapan mahkamah — lampiran 6, 9 dan 11. Kesemuanya adalah permohonan untuk membatalkan permohonan ex parte oleh Gigatech Engineering Sdn Bhd ('Gigatech') untuk diletakkan di bawah pengurusan kehakiman ('PK') dan untuk pengurus kehakiman dilantik menurut 405 Akta Syarikat 2016 ('AS') atas alasan bahawa daripada syarikat digulung kerana tidak boleh membayar hutangnya, Gigatech harus dibenarkan, di bawah PK, untuk dipulihkan dengan prospek ia terus menjadi usaha berterusan untuk faedah pemiutangnya. Lampiran 6 difailkan oleh Engreen Sdn Bhd ('Engreen') yang telah memfailkan petisyen penggulungan terhadap Gigatech kerana gagal menyelesaikan hutang penghakiman RM126,942.86 yang Engreen perolehi terhadapnya. Gigatech telah memfailkan permohonan PK enam hari sebelum petisyen sepatutnya didengar dan jika mahkamah telah memberikan perintah PK, semua prosiding terhadap Gigatech akan dibekukan melainkan dibenarkan oleh pengurus kehakiman atau mahkamah. Lampiran 11, sementara itu, telah difailkan oleh syarikat lain yang mempunyai saman belum dilupuskan di mahkamah Tinggi terhadap Gigatech kerana tidak membayar sejumlah RM1,805,568.47 untuk kerja siap. Permohonan ketiga, lampiran 9, telah difailkan oleh Malayan Banking Bhd yang mana Gigatech berhutang kira-kira RM1.3 juta (pada tarikh pemfailan permohonan PK) kerana gagal membuat bayaran sewajarnya di bawah sekuriti. Pada dasarnya, ketiga-tiga lampiran, 6, 9 dan 11, berpendapat bahawa tidak ada merit dalam permohonan PK Gigatech kerana tiada cadangan konkrit telah dikemukakan untuk menunjukkan bagaimana syarikat yang mengalami masalah kewangan boleh dipulihkan dan diteruskan sebagai usaha berterusan. Ia juga dihujahkan bahawa permohonan PK adalah langkah taktikal untuk melambatkan petisyen penggulungan Engreen dan menghalang pemiutang lain daripada memfailkan saman terhadap Gigatech. Sebaliknya, Gigatech, merujuk kepada banyak projek dalam masa terdekat yang menjanjikan keuntungan yang besar. Syarikat tersebut juga menyatakan bahawa banyak hospital adalah antara pelanggannya dan jika ia dibenarkan untuk terus bertahan, syarikat tersebut boleh memasang di hospital sistem penghawa dingin baharu ('sistem ICON') yang telah mereka cipta yang boleh mengurangkan kejadian jangkitan yang diperolehi hospital, menghapuskan kulat, mengurangkan kerosakan peralatan hospital dan mengurangkan penggunaan tenaga. Atas alasan tersebut, Gigatech bergantung kepada s

405(5)(a) AS untuk menegaskan bahawa ia adalah demi kepentingan awam untuk membenarkan syarikat diletakkan di bawah pengurusan kehakiman.

Diputuskan, membenarkan lampiran 6, 9 dan 11:

(1) Berdasarkan fakta dan keadaan kes, ini adalah kes yang jelas dan nyata untuk membatalkan permohonan pengurusan kehakiman Gigatech (lihat perenggan 65).

(2) Pendapat yang diberikan oleh pengurus kehakiman yang dicadangkan tidak membawa berat kepada mahkamah untuk memberi pertimbangan. Beliau gagal memberikan sebarang cadangan konkrit tentang bagaimana sebarang cadangan yang dinyatakan dalam s 405(1)(b) Akta Syarikat 2016 boleh dicapai. Beliau membuat kenyataan unjuran umum bahawa PK adalah pilihan terbaik untuk Gigatech tanpa memberikan alasan untuk kesimpulan tersebut. Laporan awal cadangan PK penuh dengan ketidakpastian dan tidak mengemukakan sebarang cadangan tentang bagaimana Gigatech mungkin dipulihkan atau bagaimana asetnya mungkin direalisasikan untuk membayar pemiutangnya. Tiada keterangan yang menunjukkan bahawa Gigatech boleh diteruskan sebagai usaha berterusan. Cadangan pengurus kehakiman yang dicadangkan tidak menunjukkan bagaimana Gigatech akan dapat bertahan atau memperoleh pulangan yang lebih baik untuk pemiutang jika ia tidak digulung (lihat perenggan 43, 47 & 49).

(3) Gigatech tidak menghasilkan skim berdaya maju konkrit tentang cara menambah baik aliran tunainya tanpa suntikan modal baharu ('suntikan White Knight') kerana semua perniagaan baharu masih di peringkat sebut harga. Tiada apa-apa yang konkrit untuk menunjukkan bahawa syarikat tersebut akan dapat membayar pemiutangnya dan tiada kepastian bahawa Gigatech akan dapat bangkit semula dan mengatur kedudukan kewangannya. Pemiutang menentang sebarang rancangan penstrukturan semula. Tanpa sokongan mereka, meskipun pengurus kehakiman dilantik, tiada rancangan penstrukturan semula boleh berjaya (lihat perenggan 44–45 & 51).

(4) Memandangkan permohonan PK telah difailkan hanya enam hari sebelum petisyen penggulungan Engreen sepatutnya didengar, mahkamah berpendapat bahawa pemfailan permohonan PK hanyalah satu muslihat taktikal dan untuk tujuan cagaran untuk menangguhkan pendengaran petisyen dan juga untuk menangguhkan kemajuan Saman 112 (lihat perenggan 55).

(5) Kepentingan awam tidak memerlukan Gigatech diletakkan di bawah PK. Sistem ICON yang disasarkan untuk dipasang di hospital adalah projek swasta yang tidak menerima sebarang bantuan kewangan daripada kerajaan. Gigatech tidak boleh mengaku sebagai wakil dan

benteng kepentingan awam. Walaupun Gigatech dibubarkan, terdapat syarikat swasta lain yang boleh masuk dan melaksanakan sistem ICON. Sistem ICON tidak perlu ditinggalkan hanya kerana Gigatech telah dibubarkan. Akibat tidak membuat perintah PK tidak akan menyebabkan sebarang kesan ekonomi dan sosial kepada orang ramai (lihat perenggan 60–63).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Biaxis (M) Sdn Bhd, Re [2022] 7 MLJ 443, HC (refd)
Bintan Lagoon Resort Ltd, Re [2005] 4 SLR 336, HC (refd)
Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors [2011] 5 MLJ 521, FC (refd)
Harris Simons Construction Ltd, Re [1989] BCLC 202, Ch D (refd)
Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473; [2019] 10 CLJ 412, HC (refd)
Maybank Investment Bank Bhd & Others v Million Westlink Sdn Bhd (Civil Appeal No B-02-(IM)-1590–08 of 2019) (unreported), CA (folld)
Scomi Group Bhd, Re [2022] 7 MLJ 620; [2021] 10 CLJ 975, HC (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 MLJ 492, CA (refd)
Queensland Electricity Commission and others; Ex parte Electrical Trades Union of Australia, Re (1987) 72 ALR 1; (1987) 61 ALJR 393, HC (refd)
Vision Development Concept Sdn Bhd v Low Sheh Ling and another case [2021] 12 MLJ 193, HC (refd)

Legislation referred to

Companies Act 2016 ss 404, 405, 405(1)(a), (1)(b), (1)(b)(i), (5), (5)(a), 409, 410, 420, 420(1)
Insolvency Act 1986 [UK] s 8
Rules of Court 2012 O 15 r 6(2), O 18 r 19(1), O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 92 r 4

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Wan Zhi Lam (Ming, Yee & Co) for the proposed intervener.
Lalitha (Teh Soon Kee & Partners) for the proposed intervener (JWK Engineering Sdn Bhd).
CH Yeap (CH Yeap Maluda Cheh) for Malayan Banking.

Azmi Ariffin J:

INTRODUCTION

[1] There are three enclosures before this honourable court for me to decide:

(a) encl 6 dated 13 June 2022 is the proposed intervener ('ENGREEN SDN BHD (previously known as 'EG CHEMICALS & ENGINEERING SDN BHD') for notice of application under O 15 r 6(2), O 18 r 19(1)(b) and/or O 18 r 19(1)(c) and/or O 18 r 19(1)(d) of the Rules of Court 2012 and/or the inherent jurisdiction of this honourable court for the followings orders:

(1) Bahawa kebenaran diberikan kepada Pencelah Yang Dicadangkan untuk mencelah dalam prosiding ini;

(2) Bahawa Pencelah Yang Dicadangkan dijadikan pihak kepada prosiding ini dan tajuk tindakan ini dipinda untuk memasukkan Pencelah Yang dicadangkan sebagai Responden di sini;

(3) Bahawa Saman Pemula ex parte Pemohon yang bertarikh 07.06.2022 dibatalkan atas alasan bahawa:

3.1 ia mengaibkan, remeh atau menyusahkan; dan/atau

3.2 ia boleh menjejaskan, menghalang atau melengahkan hak EnGreen Sdn Bhd (dahulunya dikenali sebagai EG Chemicals & Engineering Sdn Bhd), Pencelah Yang Dicadangkan untuk meneruskan prosiding penggulungan di mahkamah Tinggi Malaya di Shah Alam (Penggulungan Syarikat No BA-28NCC-15203/2022) terhadap Pemohon; dan/atau

3.3 ia selainnya adalah suatu penyalahgunaan proses mahkamah.

(4) Perintah Sampingan Tambahan (Further Ancillary Order): Bahawa berkuatkuasa dari tarikh Perintah untuk Notis Permohonan ini, apa-apa permohonan lanjut oleh Pemohon untuk apa-apa perintah untuk Pengurusan Kehakiman berkenaan dengan Gigatech Engineering Sdn Bhd (No Syarikat: 200001015988 (518595-T)) hendaklah dibuat secara inter-partes dan permohonan sedemikian hendaklah diserahkaan kepada EnGreen Sdn Bhd (dahulunya dikenali sebagai 'EG Chemicals & Engineering Sdn Bhd'), iaitu Pencelah Yang Dicadangkan dan pengarah-pengarah dan/atau pemegang-pemegang saham Gigatech Engineering Sdn Bhd (No Syarikat: 200001015988 (518595-T)) dihalang daripada memfailkan apa-apa permohonan untuk perintah untuk Pengurusan Kehakiman di mana-mana mahkamah di Malaysia sekiranya Notis Permohonan ini dibenarkan sementara menunggu rayuan Pemohon terhadap Notis Permohonan ini (sekiranya dibenarkan);

(5) Kos permohonan ini ditaksirkan atas dasar tanggung rugi peguamcara-anak guam dan dibayar oleh Pemohon kepada Pencelah Yang Dicadangkan; dan

(6) Sebarang perintah lanjut dan relif lain yang dianggap adil dan suaimanfaat oleh mahkamah yang Mulia ini.

(b) encl 9 dated 29 June 2022 is the Malayan Banking Bhd for notice of application under O 18 r 19(1)(b), (c) and (d)of the Rules of Court 2012 and O 92 r 4 of the of the Rules of Court 2012 for the following orders:

(i) Saman Pemula bertarikh 7/6/2022 (Lampiran 1) dibatalkan atas alasan bahawa:

(a) Ia mengaibkan, remeh atau menyusahkan dan Pemohon telah mengingkari terma-terma di dalam Dokumen-Dokumen Sekuriti yang dimasukki di antara Peminjam/Pemohon dan Pemuitang Bercagar; dan/atau

(b) Jaminan Pemuitang Bercagar daripada Syarikat Jaminan Pembiayaan Perniagaan Bhd ('SJPP') akan terjejas oleh permohonan bagi Perintah Pengurusan Kehakiman ini; dan/atau

(c) la selainnya adalah suatu penyalahgunaan proses mahkamah.

(ii) Kos ditanggung oleh Pemohon; dan

(iii) Mana-mana Penghakiman yang dianggap adil dan patut oleh mahkamah Yang Mulia ini.

(c) encl 11 dated 29 June 2022 is the proposed intervener ('JWK ENGINEERING WORKS SDN BHD') for notice of application under O 15 r 6(2), O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of this honourable court for the followings orders:

(1) Bahawa kebenaran diberikan kepada Pencelah Yang Dicadangkan untuk memasukkan Pencelah Yang Dicadangkan di dalam tindakan ini;

(2) Bahawa Pencelah Yang Dicadangkan dijadikan satu pihak dan dinamakan sebagai Responden di dalam tindakan ini;

(3) Bahawa Saman Pemula ex parte Pemohon yang bertarikh 07–06–2022 dibatalkan dan/atau ditolak atas alasan:

(a) ianya mengaibkan, remeh atau menyusahkan; dan/atau

(b) ianya menghalang atau melengahkan JWK Engineering Sdn Bhd, Pencelah Yang Dicadangkan untuk meneruskan dengan tindakan yang sudahpun ditetapkan untuk bicara penuh di mahkamah Tinggi Malaya di Shah Alam melalui Guaman No BA-22NCC-112–09/2019.

(4) Bahawa apa-apa permohonan lanjut oleh Pemohon untuk Pengurusan Kehakiman bagi Gigatech Engineering Sdn Bhd (No Syarikat: 2000105988 (518595-T)) dibuat secara 'inter-partes' dan permohonan tersebut diserahkan kepada JWK Engineering Sdh Bhd, Pencelah Yang Dicadangkan;

(5) Kos pemohonan ini dibayar oleh Pemohon atas dasar peguamcara dan anak guam kepada Pencelah Yang Dicadangkan; dan

(6) Sebarang perintah lanjut dan relif lain yang dianggap adil dan suaimanfaat oleh mahkamah Yang Mulia ini.

[2] To facilitate the determination of this three application, I find it more convenient to decide three said applications in a single judgment as they are interrelated.

[3] Let me start with encl 6.

BRIEF FACTS

[4] It is pertinent to recap the sequence of events and facts in order to appreciate the factual matrix of the present application.

[5] The applicant is a private limited company incorporated in Malaysia on 29 June 2000.

[6] The applicant's nature of business is trading, repairing, servicing and installing air-conditioners and related others services.

ENCLOSURE 6

[7] On 15 July 2021, EnGreen Sdn Bhd ('proposed intervener') an unsecured creditor had obtained a judgment (after a full trial) against the applicant and another at the Shah Alam Session Court (Civil Suit No BA-A52NCC-446–09 of 2019). For ease of reference, judgment granted delivered by the learned session court judge is reproduced below:

1. Tuntutan Plaintif sebanyak RM126,942.86 dibenarkan dengan kos sebanyak RM10,000;
2. Tuntutan Balas Defendan Pertama (Gigatech Engineering Sdn Bhd) ditolak dengan kos sebanyak RM10,000; dan
3. Defendan-Defendan membayar kepada Plaintif faedah pada kadar 5% setahun atas jumlah RM126,942.86 tersebut dari tarikh penghakiman sehingga ke tarikh penyelesaian penuh.

[8] On 7 March 2022, EnGreen Sdn Bhd ('proposed intervener') has filed a winding up petition in the High Court of Malaya at Shah Alam (Company Winding Up No BA-28NCC-152–03 of 2022) to wind up the applicant based on the applicant's failure to pay the judgment sum as demanded in the statutory notice.

[9] The hearing of the petition was fixed on 13 June 2022.

[10] On 7 June 2022, the applicant filed an application for judicial management via Originating Summons No BA-28JM-2–06 of 2022 at the Shah Alam High Court, inter alia, for the following's relief:

(a) that Gigatech Engineering Sdn Bhd (Company No 200001015988 (518595-T)) ('the present applicant in the application') be placed under the judicial management of a judicial manager by way of a court order in accordance with s 405 of the Companies Act 2016;

(b) that Ng Peak Yam @ Ng Pyak Yeow be appointed as the applicant's judicial manager; and

(c) that any proceedings against the applicant is restrained and only can initiate and/or proceed against the applicant and/or its assets with the agreement of the judicial manager or with the leave from this honourable court subject to such terms as this honourable court may impose.

ENCLOSURE 9

[11] On 17 October 2017 Malayan Banking Bhd as secured creditor has approved the applicant's application for Syarikat Jaminan Pembiayaan Perniagaan ('SJPP'), Working Capital Guarantee Scheme ('WCGS') for an overdraft amount of RM1.5m. Amongst the other terms and conditions are as follows:

(a) guarantee fee of 1% on the coverage amount is paid to SJPP on yearly basis;

(b) the annual guarantee fee shall be debited to your current account 45 days prior to its due date annually. You are to ensure that there is sufficient fund available in your account to cater for the fee payment;

(c) SJPP will provide a guarantee of 70% on the loan amount; and

(d) the facilities granted are subject to approval from SJPP under WCGS. The guarantee shall be valid for a period of seven years from the date of guarantee certificate subject to review and/or the bank's right to recall on demand.

[12] However, the applicant breached the terms of the security documents ('letter of offer' dated 17 October 2017, supplementary 'letter of offer' dated 21 August 2020, debenture dated 6 November 2020, SJPP Certificate dated 9 January 2018 and Certificate of Indebtedness as at 7 June 2022) when it failed to make the payment to Malayan Banking Bhd.

[13] Based on the Certificate of Indebtedness, the total amount outstanding due and payable by the defendants under the facilities as at 7 June 2022 and

interest at 5.65%pa on RM1,290,079.41 plus interest of 1%pa on the whole excess amount and monthly compound from 8 June 2022 until full settlement.

ENCLOSURE 11

[14] On 13 September 2019, the proposed intervener ('JWK ENGINEERING WORKS SDN BHD') filed a civil suit at Shah Alam High Court No BA-22NCC-112–09 of 2019. The proposed intervener's claim against the applicant is based on the non-payment by the applicant for the sum of RM1,805,568.47 as at 31 July 2019 (RM859,410.47 for works done in the main contract and RM946,158 for variation works) and interest at 5%pa from 1 August 2019 until full settlement.

[15] The full trial of the suit was fixed on 4 until 6 July 2022.

[16] On 7 June 2022, the applicant filed an application for judicial management via Originating Summons No BA-28JM-2–06 of 2022 at the Shah Alam High Court.

[17] So much for the factual background.

THE RELEVANT LAW RELATING TO STRIKING OUT

[18] The relevant law applicable are as follows:

(a) O 15 r 6(2) of the Rules of Court 2012:

> Misjoinder and non-joinder of parties (O 15 r 6)
>
> (2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) it any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as

between him and that party as well as between the parties to the cause or matter.

(b) O 18 r 19(1) of the Rules of Court 2012:

> Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) if discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) if may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) if is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(c) O 92 r 4 of the Rules of Court 2012 reads as follows:

> 4 Inherent powers of the Court
>
> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

THE LAW GOVERNING THE APPLICATION TO STRIKE OUT OF A JUDICIAL MANAGEMENT

[19] The now trite *locus classicus* governing an application to strike as set out by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 is as follows:

> (1) The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

[20] In *Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521, the Federal Court had occasion to deal with an application to strike out a petition to wind up a company. In *Blue Valley Plantation*, the Federal Court had opined that the court should only allow application to strike out a winding up petition where the petition itself was obviously unsustainable for want of cause of action or it being vexatious, frivolous or an abuse of process. The Federal Court cited with approval the dicta by the Court of Appeal in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492:

We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case, O 18 r 19 could be resorted to.

THE RELEVANT LAW RELATING TO APPLICATION FOR JUDICIAL MANAGEMENT

[21] The relevant law applicable are as follows:

(a) s 404 of the Companies Act 2016:

404 Application to Court for a company to be placed under judicial management and for appointment of a judicial manager

An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that —

(a) the company is or will be unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

(b) s 405 of the Companies Act 2016:

405 Power of Court to make a judicial management order and appoint a judicial manager

(1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company if —

(a) the Court is satisfied that the company is or will be unable to pay its debts; and

(b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;

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(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

(2) Upon hearing the application for a judicial management order the Court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any other order that the Court thinks fit.

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(3) Any judicial management order made under subsection (1) shall direct that during the period in which the order is in force, the affairs, business and property of the company shall be managed by a judicial manager appointed by the Court.

(4) The costs and expenses of any unsuccessful application for a judicial management order made under this section shall, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, the Court may make such orders to redress any injustice that may have resulted as the Court thinks just and equitable.

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(5) Nothing in this section shall preclude a Court —

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(a) from making a judicial management order and appointing a judicial manager if the Court considers the public interest so requires; or

(b) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may be the person nominated in the application and may exercise such functions, powers and duties as the Court may specify in the interim order.

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(6) A judicial management order shall not be made in relation to a company after the company has gone into liquidation.

(7) For the purposes of this Subdivision, 'property' in relation to a company includes money, goods, things in action and every description of property, whether real property or personal property, and whether in Malaysia or elsewhere, and also obligations and every description of interest whether present or future or vested or contingent arising out of or incidental to property.

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(8) The definition in section 466 of 'inability to pay debts' shall apply for the purposes of this section as it applies for the purposes of Subdivision 7 of Division 7 of Part IV.

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(c) s 409 of the Companies Act provides that:

409 Dismissal of application for judicial management order

Subject to subsection 405(5), the Court shall dismiss an application for a judicial management order if it is satisfied that —

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(a) a receiver or receiver and manager referred to in subparagraph 408(1)(b)(ii) has been or will be appointed; or

(b) the making of the order is opposed by a secured creditor.

(d) s 410 of the Companies Act 2016:

410 Effect of application for a judicial management order

During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application —

(a) no resolution shall be passed or order made for the winding up of the company;

(b) no steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; and

no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose.

(e) s 420 of the Companies Act 2016:

420 Statement of proposals

(1) Where a judicial management order has been made, the judicial manager shall, within sixty days or such longer period as the Court may allow, after the making of the order —

(a) send a statement of his proposal for achieving one or more of the purposes mentioned in paragraph 405(1)(b) to the Registrar and to all creditors to their last known address; and

(b) lay a copy of the statement before a meeting of the company's creditors summoned for the period of not less than fourteen days' notice.

(2) The judicial manager shall also, within sixty days or such longer period as the Court may allow after the making of the order either —

(a) send a copy of the statement to all members of the company to the last known address of all the members; or

(b) publish a notice in one widely circulated newspaper in Malaysia in the national language and one widely circulated newspaper in Malaysia in the English language stating an address to which members of the company should write for copies of the statement to be sent to the members free of charge.

THE FIRST AND SECOND PROPOSED INTERVENER'S SUBMISSION

[22] Written submission for both the proposed interveners stated amongst others are as follows:

(a) the proposed interveners has the locus standi to intervene and to oppose;

(b) the applicant's JM application was filed for an ulterior motive and there is no merit in the applicant's JM application;

(c) the applicant has failed to show that there is any reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern;

(d) the applicant's alleged current financial status;

(e) the applicant has failed to make a full and frank disclosure;

(f) the appointment of a judicial manager of the applicant would not bring any benefits to the creditors;

(g) mala fide with collateral purpose to prevent the interveners from commencing legal proceedings against the applicant;

(h) the applicant has failed to produce a letter from the proposed JM's office, inter alia, showing the proposed JM's qualification and ability to save the applicant;

(i) the proposed JM lacked expertise in managing the applicant; and

(j) the proposed judicial manager's proposal does not show how the applicant is able to survive or secure better returns for the creditors than if the company was left to be wound up.

THE SECURED CREDITOR'S SUBMISSION

[23] The secured creditor's submissions are as follows:

(a) during the subsistence of the debenture dated 6 November 2020, the applicant has agreed not to apply for an order for the applicant to be placed under judicial management or for the appointment of a judicial manager:

(i) the applicant has breached the terms and conditions of the facility agreement;

(ii) SJPP guarantee for the amount of RM1,050,000 will be affected;

(iii) abuse of court process and/or otherwise scandalous, frivolous and vexatious;

(iv) the proposed scheme and rearrangement of the applicant assets and its liabilities has no certainty and obviously unsustainable; and

(v) no prospect and viable solution to pay their debts.

(b) applicant has not come up with a concrete viable scheme on how to improve the cash flow of the applicant without new capital injection ('White Knight injection') because all new businesses are still at the quotation stage;

(c) applicant is no longer a going concern and not capable of making profit; and

(d) any proposed scheme of arrangement will result in the debenture holder taking a haircut of the total loan sum awarded to the applicant.

(i) no element of the public interest involved by not making a judicial management order.

THE APPLICANT'S SUBMISSION

[24] The applicant's submissions are as follows:

(a) applicant has fallen into financial difficulty due to the Covid-19 outbreak which has significantly affected its business and operation therefore suggesting that judicial management ought to be allowed;

(b) there was significant slowdown in the collection sales and the collection of from trade debtors and has in turn, struggled to repay the debts owed to various parties. The applicant's total assets as at 30 June 2021 is RM13,209,919 whereas the liabilities of the applicant as at 30 June 2021 (including non-current and current) amount to RM18,978,009;

(c) it is not a requirement under the Companies Act 2016 at this stage for the proposed judicial manager to prepare any draft scheme because the judicial manager is yet to be appointed;

(d) in any event, the proposed judicial manager has prepared the draft scheme/preliminary judicial management proposal report prepared by the judicial manager's office on 18 July 2022 ('the report'), inter alia, setting out the financial position of the financial position of the applicant and restructuring the debts of the applicant where RM0.38m will be available for distribution to creditors. Furthermore, based on the applicant and Infinity Concept Engineering Sdn Bhd ('Infinity') collaboration arrangement, the applicant expects to secure yearly revenue up to RM20.75m for Financial Years Ending 2023 to 2025;

(e) the proposed judicial manager has some 30 years' experience in insolvency field and was appointed by the High Court of Malaya as liquidator to some 250 incorporated companies. Hence, the proposed judicial manager will be the most suitable candidate to rehabilitate the applicant;

(f) the applicant's business is going concern and some of the quotation exhibited in encl 2 had in fact materialise into award(s) contract(s);

(g) any contention that a White Knight or investor will be required to inject capital for the survival of the applicant is misplaced given the proposed judicial manager's findings that the applicant is still and continued to be a going concern;

(h) the applicant will be in a better financial position in the coming years due to the distribution of the ICON System to hospitals and other industries. This is further fortified by the financial projection set out by the proposed judicial manager. In this regard, the applicant remains a going concern;

(i) the failure by the applicant to the second proposed intervener about the filing of encl 1 and to disclose the existence of Suit 112 in the affidavit in support of encl 1 is not sufficient ground to strike out encl 1;

(j) encl 1 is not an abuse of the court process. It does not mean to delay the progress of Suit 112 neither was it filed to prohibit the applicant from winding up;

(k) the overall purpose of judicial management is to temper the winding up of the insolvent companies where the circumstances allow for a better outcome for the creditors and/or company; and

(l) the element of public interest warrants the survival of the applicant and outweighs the interest of debenture holders.

ISSUE TO BE DETERMINED

[25] Issue for determination is:

Whether this is a plain and obvious case that can warrant a striking out order to be made.

FINDINGS OF THIS COURT

[26] It is not in dispute that the first and second proposed interveners are unsecured creditor of the applicant and has filed its notice of application to intervene and oppose the judicial management application. Hence, the proposed interveners has the interest in the proceedings, the right to the intervention and to set aside the judicial management application made by the applicant. The applicant had also acknowledged that the first and second proposed interveners are entitled to intervene in this present proceedings following the recent Court of Appeal decision delivered on 21 July 2020 in the case of *Maybank Investment Bank Bhd & Others v Million Westlink Sdn Bhd* (Civil Appeal No B-02-(IM)-1590–08 of 2019) (unreported) which held

that unsecured creditors is allowed to intervene in an application for a judicial management order. I am certainly bound by that decision. Hence, there can be no doubt that the first and second proposed interveners must be given leave to intervene.

[27] As far as limb (1)(a) of s 405 of the Companies Act 2016 is concerned, the applicant in its affidavits admits that the applicant has fallen into financial difficultly due to the Covid-19 outbreak which has significantly affected its business and operation therefore suggesting that judicial management ought to be allowed on the basis that:

(a) as at 31 May 2022, the applicant's debts owing to the trade creditors is RM4,892,189.41, and debts owing to non-trade creditors is RM74,107.75 which amounts to a total of RM4,966,297.16. The applicant has made every effort to repay the debts to the creditors by arranging/negotiating necessary payment arrangements including arranging for part-payment(s) and requesting for extension of payment deadlines; and

(b) there was significant slowdown in the collection sales and the collection of from trade debtors and has in turn, struggled to repay the debts owed to various parties. The applicant's total assets as at 30 June 2021 is RM13,209,919 whereas the liabilities of the applicant as at 30 June 2021 (including non-current and current) amount to RM18,978,009.

[28] Based on the evidence presented, I am satisfied that the first precondition of s 405(1)(a) of the Companies Act 2016 of the applicant's inability to pay its debts has been satisfied.

[29] The next consideration would be whether the making of the judicial management order would be likely to achieve one or more of the purposes as set out in s 405(1)(b) of the Companies Act 2016. The burden of proving the purposes stated in s 405(1)(b) of the Companies Act 2016 is upon the applicant and the standard of proof is on the balance of probabilities.

[30] In this regard, this honourable court only has to 'consider' that the applicant will achieve one or more of the purposes above.

[31] The word 'considers' in s 405(1)(b) of the Companies Act 2016 connotes a lower level of persuasion that the applicant will likely achieve, as compared to being 'satisfied' that the applicant is unable to pay its debts under s 405(1)(a), which requires a higher threshold.

[32] In *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473, it was held at paras [31] and [32] as follows:

A The word 'satisfied' indicates that there must be a higher threshold of persuasion.

[33] This is supported by the observation of Hoffmann J (as His Lordship then was) in relation to s 8 of the Insolvency Act 1986 (UK) in *Re Harris Simons Construction Ltd* [1989] BCLC 202 at p 204 which is reproduced below:

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> Second, the section requires the court to be 'satisfied' of the company's actual or likely insolvency but only to 'consider' that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a tower threshold of persuasion was needed in the latter case than the former.

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[34] Based on the above authorities, it is important to analyse the case as a whole and see whether the applicant will likely achieve one of the stated purposes for a judicial management order to be granted.

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[35] The words 'going concern' in s 405(1)(b)(i) of the Companies Act 2016 is defined as the ability to 'continue its operations for the foreseeable future'. In *Leadmont Development Sdn Bhd* at para 42 the High Court held that:

> The phrase 'going concern' is interchangeable with the phrase will continue its operations for the foreseeable future.

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[36] To put it in another way, the words going concern is that a business will remain active and continue its operation in the future and will not liquidate or be forced to discontinue operations due to any reasons and it will meet its financial obligations when they fall due.

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[37] To this, the learned counsel of the applicant strongly asserted that to ensure the survival of the applicant as a going concern, the applicant's related company, Infinity Concept Engineering Sdn Bhd ('Infinity'), has developed a system that controls indoor air quality and humidity without the use of any extra energy or cooling capacity ('the ICON System').

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[38] The ICON System is usually used in hospitals to eliminate fungus, reduce damage to hospital equipment and reduce energy consumption. The applicant has and intends to continue to work with Infinity to supply the ICON System to hospitals and other industries that require the same.

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[39] To this end, the applicant had recently installed the ICON System at Hospital Tunku Azizah, HKL and the system has proven to be successful. As a consequence thereof:

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(a) the applicant was approached by Konsortium Prohawk Sdn Bhd, inter alia, to provide a quotation to upgrade the temperature at the pediatric burn unit at Women and Children Hospital Kuala Lumpur. In the event

the applicant secures the project, the consideration for the said project will be approximately about RM600,000;

(b) the applicant was approached by Weida IFM Sdn Bhd, inter alia, to provide quotation for fixing the ICON System in resolving the humidity issue at Sarawak General Hospital. In the event the company secures the project, the consideration for the said project will be approximately about RM350,000;

(c) the applicant was approached by 1 Powerhouse, inter alia, to provide a quotation for fixing the ICON System. In the event the applicant secures the project, the consideration for the said project will be approximately about RM5,567,000;

(d) similarly, the applicant is now collaborating with one Golden Armani Sdn Bhd to propose the ICON System to be installed in all the government hospitals in Malaysia. To this end, the applicant has prepared a proposal for the consideration of the Ministry of Health;

(e) that the applicant had recently secured a purchase order, inter alia, to fix the ICON System at Sarawak General Hospital; and

(f) pursuant to the applicant's collaboration arrangement with Infinity, the applicant expects to secure yearly revenue up to RM20.75m for financial years ending 2023 to 2025. The details of the financial projections are set out in item 4 of the report.

[40] Further, under the judicial management proposal, the shareholder will waive debts due to the shareholder amounting to RM0.38m. This amount will thereafter be available for distribution to the creditors.

[41] Based on the above, it is submitted that the applicant's survival is irrefutable and the applicant will continue its operation for the foreseeable future upon the granting of the judicial management order by this honourable court. In this regard, the protection afforded by placing the applicant under judicial management will allow the applicant to continue its business while at the same time having the opportunity to rehabilitate the financial situation of the applicant.

[42] In the 'Proposed Judicial Manager's Preliminary Judicial Management Proposal Report' prepared by the proposed judicial manager's office dated 18 July 2022 (encl 14 pp 13–18, exh 'A20') he had this to say:

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NPY & CO
Insolvency
Solutions Providers

Our ref: NPY/GESB/JM/TSH-2

Your ref: -

18 July 2022

Private & Confidential

Gigatech Engineering Sdn Bhd
7-A, Jalan Sungai Burung X32/X
Bukit Rimau 40460 Shah Alam
Selangor

Attn: Mr Wong Cheok Gid, Director

Dear Mr Wong,

GIGATECH ENGINEERING SDN BHD ("GESB")

PRELIMINARY JUDICIAL MANAGEMENT PROPOSAL

We refer to the proposed appointment of our Mr Ng Peak Yam@ Ng Pyak Yeow **("Mr Ng")** as Judicial Manager for GESB with consent to act duly given.

In this connection, we wish to enclose herewith our preliminary Judicial Management **("JM")** Proposal of GESB for your record.

The preliminary JM Proposal is not finalised and comprehensive.

Upon appointment as Judicial Manager, we with the assistance of the management of GESB will:-

(i) conduct inspection and verification on the physical existence of the property, plant and equipment **("PPE")** and determine the net realisable value of PPE;

(ii) conduct verification exercise and obtain bank confirmations on the cash collateral, fixed deposit, bank balances placed with the various banks;

(iii) conduct review on the recoverability of the trade, other receivables and deposits; and

(iv) conduct a proof of debt exercise on the amount due to financial institutions, trade and non-trade creditors to ascertain the debts owing to the various class of creditors under the JM Proposal.

Yours truly,
For and on behalf of
NPY & CO

NG PYAK YEOW
Director

•Suite 12-09, Menara IMK, Kompleks 1 Mont Kiara, No. 1, Jalan Kiara, Mont Kiara 50480 Kuala Lumpur
•Tel: +603 6201 0062•Email:tehsewhong@cshcap.com

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Preliminary Judicial Management ("JM") Proposal

1. Introduction

GESB was incorporated on 29 June 2000.

The registered office of GESB is at 35-3, Jalan SS 15/8A, 47500 Subang Jaya, Selangor and its business address is at 7-A, Jalan Sungai Burung X32/X, Bukit Rimau, 40460 Shah Alam, Selangor.

GESB's nature of business is trading, repairing, servicing and installing of air-conditioners and provision of related services.

The issued capital of GESB is RM500,000.00 comprising of 500,000 ordinary shares, all of which were paid-up by and allotted to Wong Cheok Gid as at 31 May 2022 **("Cut-Off Date).**

GESB proposed to appoint Judicial Manager to ensure orderly management of GESB and distribution to unsecured creditors via a JM Proposals.

2. Statements of Affairs of GESB as at 31 May 2022 ("SOA")

GESB has fallen into financial difficulty particularly due to Covid-19 outbreak which has significantly affected the global markets and Malaysia. Further, the outbreak has caused a massive reduction in the number of main contractors engaging the Company for its services.

As such and as part of its cost-cutting measures, the Company had voluntarily reduced its workforce and other operating costs in order to manage its cash flow and/or outflow commitment during the pandemic.

GESB has experienced a significant slowdown in sales and the collection of payments from trade debtors and has, in turn, struggled and been unable to repay the debts owed to trade creditors and suppliers.

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As per the SOA, the Judicial Manager has noted the following:-

Details		RM	RM
Assets	Fixed Assets Land & buildings *(security for CIMB Loan)*	3,034,629.62	*Lands & buildings with fair market value of RM4,200,000*
	Assets Furniture and office equipment Deposit & Prepayment Fixed Deposit Cash at Bank Cash in Hand	39,478.54 (518,988.82) 292,327.05 1,678.30 (200.72)	**(185,705.65)**
Debts	Trade Debtors Allowance for doubtful debt Debtor Retention Sundry Debtor	1,228,662.46 (1,536,596.95) 3,671,181.96 134,963.80	**3,498,211.27**
Liabilities	**Unsecured Creditors** Trade Creditors Creditors Retention Sundry Creditors Staff Claims Accruals Unsecured short-term loan Unsecured long-term loan- RHB Bank Provision for Taxation Deposit Rental & Utilities - Gravitas Amount due to/from shareholder Bank Overdraft- several banks	 5,082,210.31 1,840,073.65 74,107.75 84,156.73 1,247,377.02 8,000.00 362,240.59 (2,592.00) 31,900.00 (385,701.82) 3,429,750.86	**11,771,523.09**
	Secured Creditors Secured long term loan- CIMB Bank Security – Lands and buildings Fair Market value Excess	 3,890,297.27 4,200,000.00 **309,702.73**	
	Deficit in Financial Position (Unsecured Creditors)		**8,459,017.47**
	Profit projections of GESB for FYE 2023		**2,025,481.00**
	Estimated distribution to Unsecured Creditors		**0.24 per RM1.00**

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3. **Details of the JM Proposal**

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Upon appointment of Judicial Manager, the Judicial Manager, with the assistance of the management of GESB will:-

(i) conduct inspection and verification on the physical existence of the property, plant and equipment (**"PPE"**) and determine the net realisable value of PPE;

(ii) conduct verification exercise and obtain bank confirmations on the cash collateral, fixed deposit, bank balances placed with the various banks;

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(iii) conduct review on the recoverability of the trade, other receivables and deposits; and

(iv) conduct a proof of debt exercise on the amount due to financial institutions, trade and non-trade creditors to ascertain the debts owing to the various class of creditors under the JM Proposal.

The proposed Judicial Manager wishes to highlight that as per the SOA as at 31 May 2022, GESB has a deficit financial position of **RM8.46 million**.

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In a liquidation scenario, all Unsecured Creditors *(trade and non-trade creditors and unsecured financial creditors)* of GESB will have zero distribution from the Company.

If the Unsecured Creditors approve the appointment of Judicial Manager and allow GESB to operate as a going-concern for financial years ending (**"FYE"**) for 30 June 2023 to 2025, all Unsecured Creditors of GESB may improve the distribution up to RM0.24 or more subject to further review and verification by the Judicial Manager.

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GESB's business partner, Infinity Concept Engineering Sdn Bhd (**"Infinity"**) has developed a system that controls the indoor air quality and humidity without the use of any extra energy or cooling capacity (**"the ICON System"**). The ICON System is usually used in hospitals to eliminate fungus, reduce damage to hospital equipment and reduce energy consumption.

GESB will work with Infinity to supply the ICON System to hospitals and other industries that require the ICON Systems.

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Based on GESB and Infinity's collaboration arrangement, GESB expects to secure yearly revenue up to RM20.75 million for FYE 2023 to 2025, which translate to financial projections as set out below:-

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	FYE 2023	FYE 2024	FYE 2025
Revenue	20,502,015	20,152,946	20,745,535
Cost of Goods Sold	(17,028,263)	(16,979,189)	(17,481,181)
Gross Profit	3,473,752	3,173,757	3,264,354
Other income	-	-	-
Administrative	(645,718)	(665,089)	(685,042)
Finance cost	(218,192)	(224,737)	(231,480)
Profit before taxation	2,609,843	2,283,930	2,347,833
Taxation	(584,362)	(506,143)	(521,480)
Profit after taxation	2,025,481	1,777,787	1,826,353

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5. **Rationale for the JM Proposal**

(i) Under the Judicial Management, the Company is in a better financial position as compared to being liquidated, as there will be available cash distribution up to RM0.24 per RM1.00 of debts owed to the Unsecured Creditors.

(ii) Under the Judicial Management, the debts of RM0.38 million due to the shareholder will be irrevocably and conditionally waived for repayment.

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(iii) Under the liquidation scenario, the distribution ratio is a distribution of RM0.00 for every RM1.00 owed. The Judicial Manager proposes that the Unsecured Creditors to accept the preliminary JM Proposal as it provides more distribution to the Unsecured Creditors as they will receive a distribution up to RM0.24 for every RM1.00 owed, as opposed to Liquidation Scenario where Unsecured Creditors will receive zero distribution.

(iv) The JM Proposal provides an orderly and formal framework to decisively address the issue of the GESB's indebtedness, by rescheduling and restructuring the repayment of such indebtedness to the Creditors and thus alleviate the financial burden on GESB's debt servicing and repayment obligations.

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(v) Judicial management is the most viable and expedient option for preserving GESB's business as a going concern or serving the interests of Creditors. The protection afforded by being under judicial management will allow GESB to continue its business and complete its pending projects in an attempt to realise the full value of the retention sums held by the Debtors.

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6. **Conclusion**

Premised on the foregoing, the Company is in a better financial position as compared to being liquidated, as there will be available cash distribution up to RM0.24 per RM1.00 of debts owed to the Unsecured Creditors.

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[43] With respect, I find that the opinion given above by the proposed judicial manager does not carry much weight for this honourable court to give due consideration. The preliminary judicial management proposal report have not put forward any suggestion as to how the applicant may be rehabilitated nor how its assets may be realised in order to satisfy the applicant's indebtedness. There is also no evidence to suggest that the applicant is able to continue as a going concern. The proposed judicial manager's proposal does not show how the applicant is able to survive or secure better returns for the creditors than if the company was left to be wound up.

A **[44]** Furthermore, based on the documentary evidence presented, applicant has not come up with a concrete viable scheme on how to improve the cash flow of the applicant without new capital injection ('White Knight injection') because all new businesses are still at the quotation stage. In short, to me, there was nothing firm or concrete presentation made in the proposal report that could show the applicant's capability to pay off the unsecured creditors and secured creditor.

[45] Hence, there can be no certainty that the applicant would be back on its feet and be able to regularise its financial position. In addition, with the strong stand taken by the secured creditor opposing the proposed restructuring plan, I am moved to say that it might be highly difficult or impossible the restructuring plan and/or any proposed scheme will be approved. As a result, the judicial management exercise will fail accordingly.

[46] I am fully aware that s 420(1) states that:

> 420(1) Where a judicial management order has been made, the judicial manager shall, within sixty days or such longer period as the Court may allow, after the making of the order —
>
> (a) send a statement of his proposal for achieving one or more of the purposes mentioned in paragraph 405(1)(b) to the Registrar and to all creditors to their last known address; and
>
> (b) lay a copy of the statement before a meeting of the company's creditors summoned for the period of not less than fourteen days' notice.

[47] Be that as it may, to me, the proposed judicial manager should have given his professional opinion on how his plan or proposal would achieve the purposes mentioned in para 405(1)(b) for this honourable court's consideration. I certainly find it very difficult to give weight to the applicant's application when the proposed judicial manager only provided a general projection statement by stating that in his opinion judicial management is the best option for the applicant without even setting out the detailed reasons for him having to arrive to that conclusion. With respect, the such kind of open projection statement had seriously weakened the probative force of the applicant's case.

[48] In *Vision Development Concept Sdn Bhd v Low Sheh Ling and another case* [2021] 12 MLJ 193, the court had this to say:

> [42] I am unable to find any evidence provided by Vision that it fits the requirement that the appointment of the JM would achieve the survival of the company as a going concern or to put it in another way that Vision would be able to continue its operations for the foreseeable future. As a whole there are only bare averments presented by Vision to this court on the reasonable probability of rehabilitating

Vision or preserving all or part of its business as a going concern or that otherwise the interest of creditors would be better served than by resorting to a winding up, all of which are unsupported by any evidence or proper details.

[44] The submission by Vision that there are assets to meet the creditors demands and that once the adjudication decision is enforced, the creditors of Vision would benefit and that the WUP would only complicate and delay the same are not factors which has convinced this court as the adjudication decision has been set aside and the documents submitted by Vision themselves in its various affidavits referred to by me earlier clearly indicate that there are insufficient assets in which to meet the creditors demands. This court is also in the circumstances unable to accept that a winding up does not provide any benefit to other creditors of Vision or that the funds of Vision would be used for a better purpose ie to pay off creditors than being involved with multiple litigation which would not benefit the creditors ultimately, due to the large disparity in Vision's liabilities as opposed to its assets and trade receivables. I thus find that s 405(1)(b)(iii) of the CA in that the requirement of a 'more advantageous realisation of the company's assets would be effected than on a winding up' has also not been proven by Vision.

[49] To conclude on this issue, I am of the considered view that the vague proposal provided by the applicant on how it is working towards resolving their effort and resources on restructuring and rehabilitation of the project is full of uncertainty and hence this honourable court will not grant the judicial management order as prayed for by the applicant.

[50] In this context, one must not lose sight the case which is directly on point none other than the *Re Biaxis (M) Sdn Bhd* [2022] 7 MLJ 443, where the court held as follows:

[49] The applicant have not put forth a tangible proposal. All that was appended to support the proposal was the white knight's (Vizione) letter of intent and a draft indicative term sheet. They were both vague, speculative and scant on details.

...

[54] Unfortunately, the figures quoted were not substantiated or verified. There was no satisfactory explanation of the rationale of the proposal and how the proposal would achieve better realisation. In particular, I find it quite disconcerting that the applicant were able to surmise such luring figures for better realisation when Vizione have not even indicated the capital injection that they are prepared to make.

[51] Moreover, as I have said even if the judicial management application is allowed and judicial manager is appointed, I am still of the view that it is highly impossible that the restructuring plan to be proposed by the judicial manager could be approved from the current stand taken by the secured creditor and other unsecured creditors who will firmly oppose the schemes presented. Hence, without an agreement from secured creditor and other unsecured

creditors the restructuring plan is bound to fail. To allow the judicial management will certainly prejudice all the secured creditors and the unsecured creditor.

[52] Section 409 of the Companies Act 2016 provides that:

> 409 Dismissal of application for judicial management order
>
> Subject to subsection 405(5), the Court shall dismiss an application for a judicial management order if it is satisfied that —
>
> (a) a receiver or receiver and manager referred to in subparagraph 408(1)(b)(ii) has been or will be appointed; or
>
> (b) the making of the order is opposed by a secured creditor.

[53] In the case of *Re Scomi Group Bhd* [2022] 7 MLJ 620; [2021] 10 CLJ 975, the High Court at paras [39] and [40] held that when the judicial management application is opposed by the secured creditor who has a right to veto the judicial management application, the applicant will not be entitled to obtain a judicial management order and the court must dismiss the application.

[54] Moving on, 7 March 2022, EnGreen Sdn Bhd filed a winding up petition in the High Court of Malaya at Shah Alam (Company Winding Up No BA-28NCC-152–03 of 2022) to wind up the applicant

[55] The hearing of the said winding up petition was fixed on 13 June 2022. However, on 7 June 2022, the applicant filed the present application for judicial management six days before the hearing date. Hence, it is my considered view that the true intention of filing the present judicial management application is just a tactical manuevor and for a collateral purpose of stalling the hearing of the winding up petition and also to delay the progress of Suit 112.

[56] I shall now touch very briefly on the issue of public interest. What constitutes 'public interest' is not defined in the Companies Act 2016.

[57] Thus, 'public interest' must be determined on a case to case basis (see *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473; [2019] 10 CLJ 412 at paras [45] and [46]). However, the courts in considering public interest in a judicial management application have taken a strict approach where public interest is to be interpreted restrictively and should only apply in the most exceptional circumstances.

[58] In the *Words, Phrases & Maxims Legally and Judicially Defined,*

(LexisNexis), the High Court of Australia in *Re Queensland Electricity Commission and others; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1; (1987) 61 ALJR 393. Mason CJ, Wilson and Dawson JJ (at ALR 5; ALJR 395) held that:

> Ascertainment in any particular case where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree. The purpose of the reference to 'public interest' is to ensure that private interests are not the only matters taken into account; to make clear that the interests of the whole community are matters for the Commission's consideration ....' The question whether a particular thing is in the public interest is a question of the time and a question of fact (cf *Re Amalgamated Anthracite Collieries Ltd's Application* (1927) 43 TLR 672). It is to be decided in light of all the circumstances and the conditions as they exist at the present time ...

[59] In *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR 336, the Singapore High Court held at paras [13] and [14] that:

> 13. ... the court must be of the view that the public interest so requires; it should not only be opportune but also importunate that the power be exercised. Thus, even assuming, as the petitioners' counsel contended, that it is in the public interest to rescue companies with a decent chance of survival, that alone is not enough.
>
> 14. The question whether the public interest so requires may perhaps best be answered by considering the likely consequences of not making a judicial management order. Will a refusal to make such order lead to or allow the dismemberment or collapse of a company whose failure will have a serious economic or social impact? The *Pan-Electric* type of case comes immediately to mind as a paradigm but I do not suggest that the circumstances need be as dire nor that the consequences of not granting the order should be as grievous. What I can say is that the mere fact that amongst the petitioners is a listed company in Singapore or a statutory body as such Inland Revenue Authority of Singapore is not enough. If the Company were to fail and the debts owed to such a petitioner had to be written off, it will be of no great moment.

[60] There can be no doubt that there is only one exception where the court may still allow a judicial management order notwithstanding the fact that the applicant has failed to meet the requisite criteria as set out in s 405 of the Companies Act 2016 that is when the court considers that public interest so requires the judicial management order be made. This exception is provided in s 405(5)(a) of the Companies Act 2016 reads as follows:

> (5) Nothing in this section shall preclude a court —
>
> (a) from making a judicial management order and appointing a judicial management if the court considers the public interest so requires; or ...

[61] In the present case, the applicant claimed that there was existence of 'public interest' within s 405(5) of the Companies Act 2016 to warrant the

judicial management application and in the event that present judicial management application is not allowed, it will bring both social and economic impacts. The basis for such contention are as follows:

(a) given the applicant's business in installing the ICON System, which is vastly used in hospitals, the survival of the applicant is paramount and outweighs the interest of the secured creditor;

(b) if wound up, the applicant will not be able to distribute the ICON System which is for the benefit of the public as it effectively reduces the chances of hospital-acquired infections, fungus and sick building syndrome in hospitals; and

(c) the ICON System also saves the Government millions of Ringgits due to lower energy consumption. This is evident from the 'Installation of Innovative Cooling Coll System at Hospital Teluk Intan — Half Year Audit Report' prepared by the applicant wherein the installation of the ICON System at Hospital Teluk Intan effectively reduced energy consumption by 40%.

[62] With greatest respect, I beg to differ. The applicant is a private entity entrusted in installing the ICON System which is a private project. Hence, the applicant cannot claim to be the representative and bastion of the public interest. It is a private project with no financial assistance given by the Government.

[63] Moreover, there are also other private company who can step in and assume the operational responsibility of the applicant in order to continue and complete the installation of the ICON System. This project will not be abandoned even if the applicant is under liquidation. Premised on the above, the consequences of not making a judicial management order would not cause any economic and social impact to the public.

[64] Finally, there can be no doubt that there are also other ancillary issues submitted in the course of the respective submission by both parties. However, I am not inclined to dwell on any of them. My views on them would have no effect on my finding.

CONCLUSION

[65] Bearing in mind the established principle stated in the above cases, I am of the view that based on the facts and circumstances of this case, this is a plain and obvious case for striking out of the judicial management application.

[66] Enclosure 6 is allowed with cost of RM7,000 to be paid by the applicant to Engreen Sdn Bhd. Costs on a solicitor-client indemnity basis to be paid by the applicant as prayed for by Engreen Sdn Bhd is not allowed.

[67] Enclosure 9 allowed with cost of RM7,000 to be paid by the applicant to Malayan Banking Bhd.

[68] Enclosure 11 allowed with cost of RM7,000 to be paid by the applicant to JWK Engineering Works Sdn Bhd.

Enclosures 6, 9 and 11 allowed.

Reported by Ashok Kumar